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NO. 84-1145

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THURMAN B. LANTON,

APPELLANT

V.

STATE OF ALABAMA,

APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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AND

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the question on which the decision of the

cause depends is so insubstantial as not to need further argument, and that the proposition upon which Appellant bases this Court's jurisdiction is entirely without foundation.

I.

THE NATURE OF THE CASE

Appellant does not challenge the validity of any Alabama statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Instead, Appellant seeks to have his state court conviction of rape overturned on the ground that he was denied equal protection of the laws when the trial court denied his motion for physical examination of the rape victim. Criminal defendants, Appellant argues, should be afforded the same right to

require a physical examination of a party whose physical condition is in controversy, as are civil litigants pursuant to Rule 35(a), Alabama Rules of Civil Procedure. That rule, which is identical to Rule 35(a) of the Federal Rules of Civil Procedure, provides in pertinent part:

> (a) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant argues that Rule 35(a), Alabama Rules of Civil Procedure, gives a civil litigant the right to require a physical examination of another party when that party's physical condition is in controversy. Such is not the case. As the wording of the rule clearly indicates, the court may order the party to submit to a physical examination. Whether or not an examination is ordered in civil cases in Alabama is a matter within the sound discretion of the trial court. "The trial court has a judicial discretion to exercise when presented with a motion seeking the blood group testing of the parties and of a child in a divorce case. An order for such

testing must not be routinely granted as of right, but should be carefully utilized. Balfour v. Balfour, 413 So.2d 1167, 1169 (Ala.Civ.App. 1982).

In Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), this Court held that mental and physical examinations under Rule 35(a) of the Federal Rules of Civil Procedure are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the rule, and are not to be ordered routinely.

Appellant here was afforded no less protection than civil litigants moving for physical examination pursuant to Rule 35(a). The law is clear in Alabama that the power to compel the physical examination of a prosecutrix in the event of her refusal to submit to such an examination is also a matter of judicial

discretion with the trial court. McGuff v. State, 88 Ala. 147, 7 So. 35 (1889). The trial court's denial of Lanton's motion for physical examination of the prosecutrix was an exercise of sound judicial discretion. Appellant was not denied equal protection of the laws.

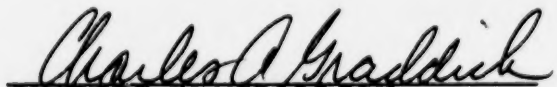
The proposition upon which Appellant bases the contention as to this Court's jurisdiction to review the judgment of the state court is entirely without foundation. This court should therefore affirm the judgment of the state court.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to require further argument, and that the proposition upon which Appellant bases this Court's jurisdiction is entirely without foundation. Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Alabama.

Respectfully submitted,



CHARLES A. GRADDICK
ATTORNEY GENERAL

GLENN L. DAVIDSON
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1985, I did serve a copy of the foregoing Motion on the Attorney for the Appellant, by placing same in the United States Mail, postage prepaid.

Samuel L. Adams
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